

DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D. C. 20548

Szermeth
PC-II

B-219596

FILE:

Sperry Corporation

DATE: October 16, 1985

MATTER OF:

DIGEST:

1. Where protester is aware that agency has decided to reopen negotiations because it sustained a protest filed by a competing offeror but does not know the reason why the protest was sustained until it receives information requested under the Freedom of Information Act, protest alleging that agency's actions were improper because there was no merit to the protest is timely, since protest was filed within 10 days of the receipt of the information.
2. Allegation that agency's determination to reopen negotiations was improper because agency's conclusion that it failed to conduct meaningful discussions with one offeror was erroneous is denied, since an agency has discretion to decide when the negotiation and offer stage of a procurement will conclude, and a sufficient reason to conduct further negotiations exists where an agency in good faith finds that an offeror has not been treated fairly.

Sperry Corporation protests the Department of the Navy's determination to reopen negotiations under request for proposals (RFP) No. N61339-84-R-0056 issued by the Naval Training Equipment Center. The RFP was for a simulation device called the Landing Craft Air Cushion (LCAC) Full Mission Trainer to be used to train Navy personnel to operate the LCAC, a large hovercraft vessel used to transport military cargo from supply ships to shore. Sperry argues that the Navy's decision to reopen negotiations was unreasonable.

We deny the protest.

083474

The RFP was issued on April 30, 1984 and, in response, the Navy received proposals from the General Electric Company (GE) and from Sperry. The Navy conducted an initial evaluation of the proposals and by letter dated August 21, 1984, both Sperry and GE were sent a list of questions concerning the areas in their respective proposals which required clarification. Both offerors submitted additional information to the Navy and, in October 1984, the Navy conducted a visual demonstration test of the simulators proposed by the two firms.

The proposals were again reviewed and on May 15, 1985, GE was advised that its proposal was technically unacceptable and would no longer be considered for award. The Navy found that GE's proposal failed to conform to the essential requirements of the RFP and that the proposal was not susceptible to being made acceptable without major revisions. At the same time, the Navy began final discussions with Sperry, and during the period May 29-31 the Navy and Sperry met and resolved all outstanding questions concerning Sperry's technical proposal and contract price.

By letter dated May 29, however, GE had protested to the Navy the rejection of its proposal. GE argued that the Navy had failed to conduct meaningful discussions with the firm and that GE should have been allowed to submit a best and final offer. The Navy reviewed the allegations and concluded that GE had not been properly advised of the substantive deficiencies in its proposal or provided an opportunity to correct these deficiencies. By letter of June 14, the Navy notified GE and Sperry that the "competitive award procedure" would be continued and that additional negotiations would be conducted. Subsequently, on June 26, the Navy advised both GE and Sperry of additional requirement changes and requested the submission of revised technical and cost proposals. A new anticipated award date was set for May 31, 1986.

Sperry's protest was filed with our Office on July 18, 1985, and was supplemented by letter received here on August 6. The Navy argues that the protest is untimely since it was filed more than 10 working days after the receipt of the Navy's June 14th letter advising Sperry that further negotiations would be conducted. Sperry argues that the June 14 letter only indicated that the Navy had sustained GE's protest but did not include any specifics as to how the Navy would proceed. Sperry contends that only upon

receipt of the June 26 letter was it made clear that the Navy intended to conduct a lengthy new procurement process. Sperry indicates that its protest was filed within 10 working days of the receipt of that letter and is therefore timely.

In addition, Sperry suggests that it was actually entitled to await the receipt of information concerning the grounds for GE's protest since the reasonableness of the Navy's actions could not be assessed properly until that time. Sperry states that it promptly filed a Freedom of Information Act (FOIA) request with the Navy and that the Navy's response, which included a copy of GE's protest, was not received until July 29. Accordingly, Sperry maintains that the protest was timely filed.

We find Sperry's protest timely. Although Sperry knew of the Navy's decision to reopen negotiations at an earlier date, Sperry did not become aware of the actual reasons for this determination until it received the FOIA materials it had requested; Sperry's supplement to the protest is based on the information contained therein. We will consider such a protest so long as it is filed within 10 working days of the protester's receipt of information upon which its protest is founded and the protester diligently pursued the release of information under FOIA. Carrier Corp., B-214331, Aug. 20, 1984, 84-2 CPD ¶ 197; J. C. Yamas Co., B-211105, Dec. 7, 1983, 83-2 CPD ¶ 653. Accordingly, the protest is timely and we will consider it on the merits.

Sperry argues that the record does not support the Navy's decision sustaining GE's protest. Sperry contends that no discussions with either Sperry or GE were held and, therefore, there was no basis for the Navy to conclude that meaningful discussions were not conducted with GE. Sperry argues that no evidence has been presented which demonstrates that GE's proposal was not properly rejected as technically unacceptable, and that the Navy has not provided a sufficient basis which justifies the further consideration of the proposal. Accordingly, Sperry contends that the Navy should not have reopened what was, in effect, a completed procurement process.

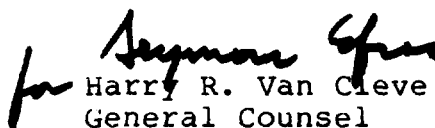
The protester has presented extensive arguments addressing the merits of GE's protest. However, in our view, the Navy need not demonstrate that it failed to conduct meaningful discussions with GE in order to justify its decision to take remedial action by conducting further negotiations. Our decisions recognize that it is up to the

procuring agency to decide when the negotiation and offer stage of a procurement will conclude, and an agency's decision in this regard will not be disturbed absent a clear showing that the agency abused its discretion. Xerox Special Information Systems, B-215557, Feb. 13, 1985, 85-1 CPD ¶ 192; Crown Point Coachworks and R&D Composite Structures et al., B-208694 et al., Sept. 29, 1983, 83-2 CPD ¶ 386. Furthermore, our decisions have recognized that an agency could always reopen negotiations where it finds that it would be in the government's best interests to do so. See e.g., Defense Research, Inc., B-215610, July 23, 1984, 84-2 CPD ¶ 90. We believe that where an agency in good faith determines that proper discussions were not conducted and that as a result, further negotiations are warranted, the agency, in our view, has established a sufficient reason which justifies the corrective action taken. We will question an agency's determination in this regard only upon a showing that the agency's decision is fraudulent or so grossly erroneous as to imply bad faith. See Kisco Company, Inc., B-216953, March 22, 1985, 85-1 CPD ¶ 334.

Here, the Navy concluded that it in fact had conducted discussions with both offerors, but that meaningful discussions had not been held with GE. Although Sperry disagrees with the Navy's conclusions, the record contains no evidence that the Navy's determinations were not made in good faith or that the determinations were made with the specific intent of avoiding the award to Sperry. Cf., T. Warehouse Corp., B-217111, June 27, 1985, 85-1 CPD ¶ 731. Under these circumstances, we cannot conclude that the Navy acted improperly by continuing the negotiation process.

Finally, we note that Sperry complains that the Navy's report failed to contain a statement from the contracting officer, and also expresses concern about the increased possibilities for technical leveling or transfusion which may occur due to the extended negotiation process. In our view, the Navy's report adequately addressed the issues raised and we do not consider it deficient because a statement from the contracting officer was not included. Also, while we understand Sperry's concern, the Navy has indicated that it will proceed with utmost caution to protect the information provided by the offerors.

The protest is denied.


for Harry R. Van Cleave
General Counsel